Supreme Court, U.S.
FILED

97-272 AUG 11 1997

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In The

Supreme Court of the United States

October Term, 1996

JOHN DANIEL LEASURE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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49 pp

QUESTION PRESENTED FOR REVIEW

Whether the legal ambiguity created by the conflict between the governing statute, 26 U.S.C. § 5861(i), and the applicable regulation, 27 C.F.R. § 179.102, constitutes denial of substantive due process, and therefore precludes a conviction.

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The slip opinion of the Fourth Circuit was dated March 12, 1997. (Appendix A, pp. 1a-10a).

The Order denying rehearing was entered May 12, 1997. (Appendix F, pp. 25a-26a).

STATEMENT OF JURISDICTION

Jurisdiction in the United States Court of Appeals for the Fourth Circuit was grounded on 28 U.S.C. § 1291.

Jurisdiction in the United States Supreme Court is grounded on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

U.S. Const. Amend. V, provides in part:

> No person shall be held to answer for a capital or otherwise infamous crime unless . . . nor be deprived of life, liberty or property, without due process of law. . . .

26 U.S.C. § 5842 provides:

> (a) Identification of fireārms other than destructive devices. — Each manufacturer and importer and anyone making a firearm shall identify each firearm, other than a destructive device, manufactured, imported, or made by a serial number which may not be readily removed, obliterated, or altered, the name of the manufacturer, importer,

maker, and such other identification as the Secretary may by regulations prescribe.

(b) Firearms without serial number. — Any person who possesses a firearm, other than a destructive device, which does not bear the serial number and other information required by subsection (a) of this section shall identify the firearm with serial number assigned by the Secretary and any other information the Secretary may by regulations prescribe.

(c) Identification of destructive device. — Any firearm classified as a destructive device shall be identified in such manner as the Secretary may by regulations prescribe.

26 U.S.C. § 5861: Prohibited Acts

It shall be unlawful for any person. . . .

(i) to receive or possess a firearm which is not identified by a serial number as required by this chapter. . . .

27 C.F.R. § 179.102 *Identification of Firearms*

Each manufacturer, importer, or maker of a firearm shall legibly identify it by engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on the frame or receiver thereof in a manner not susceptible of being readily

obliterated, altered, or removed, an individual serial number not duplicating any serial number placed by the manufacturer, importer, or maker on any other firearm, and by engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on the frame, receiver, or barrel thereof in a manner not susceptible or being readily obliterated, altered or removed, the model, if such designation has been made; the caliber or gauge; the name (or recognized abbreviation of same) of the manufacturer, or maker, and also, when applicable, of the importer; in the case of a domestically made firearm, the city and state (or recognized abbreviation thereof) wherein the manufacturer or importer maintains his place of business, or the maker made the firearm; and in the case of an imported firearm, the name of the country in which manufactured and the city and State (or recognized abbreviation thereof) of the importer:

Provided, that the Director may authorize other means of identification of the manufacturer, importer, or maker upon receipt of letter application, in duplicate, from same showing that such other identification is reasonable and will not hinder the effective administration of this part;

Provided, further, that in the case of a

destructive devise, the Director may authorize other means of identifying that weapon upon receipt of letter application, in duplicate, from the manufacturer, importer, or maker showing that engraving casting, or stamping (impressing) such a weapon would be dangerous or impracticable.

A firearm frame or receiver or any other part as defined as a machinegun or a muffler or silencer for the purposes of this part which is not a component part of a complete weapon at the time it is sold, shipped, or otherwise disposed of by a manufacturer, importer, or maker shall be identified as required by this section.

The Director may authorize other means of identification of parts defined as machineguns other than frames or receivers and parts defined as mufflers upon receipt of a letter application, in duplicate, showing that such other identification is reasonable and will not hinder the effective administration of this part.

STATEMENT OF THE CASE

A. The Course of Proceedings in the District Court

The indictment charged in Count 1 that Petitioner, John Leasure, knowingly and unlawfully possessed nineteen firearm silencers which were not identified by serial number, in violation of 26 U.S.C. § 5861(i). (Appendix [App.] E, p. 23a). Counts 2 and 3 charged that he possessed unregistered silencers in

violation of 26 U.S.C. § 5861(d). Count 4 charged that he possessed unregistered silencers attached to rifles in violation of § 5861(d). Count 5 charged that he possessed machineguns in violation of 18 U.S.C. § 922(o)(1). Count 6 charged that he possessed "one (1) weapon" which was unregistered, in violation of 26 U.S.C. § 5861(d).

The matter came before the Court, Honorable John A. MacKenzie presiding, for a bench trial on January 18-19, 1996. By order filed on February 6, 1996, the Court found Petitioner guilty of Counts 1, 2, 3 and 6, and not guilty of Counts 4 and 5. (App. 15)[1].

On February 12, 1996, Petitioner filed a motion for a new trial, and filed a supplement to the motion on March 25, 1996. On May 21, 1996, after an evidentiary hearing, the Court entered a judgment dismissing Counts 2, 3 and 6. (App. 12a). The Court sentenced Petitioner on Count 1, the only remaining Count, to twelve (12) months imprisonment and imposed an assessment of $50.00.

B. Facts

John Leasure was a special (occupational) taxpayer, qualifying as a manufacturer, under the National Firearms Act ("NFA"), Chapter 53 of the Internal Revenue Code, and was a federally-licensed manufacturer of firearms. (TR 17,181). This matter arose when Charles Lee Turner of the Bureau of Alcohol, Tobacco and Firearms (BATF), who is assigned to collect revenue and to conduct compliance inspections of firearms licensees, conducted an inspection of Precision Arms

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1. By order entered on May 31, 1996, the court amended the judgment to clarify that Counts 2, 3 and 6 were dismissed on defense motion and that defendant had been found not guilty on Counts 4 and 5. (App. 11a).

International, Inc., Mr. Leasure's business, over a five-or six-day period. (TR 14-16).[2]

Since he believed that he found certain discrepancies, Inspector Turner returned several days later with a search warrant. Mr. Leasure had not attempted to hide anything and was cooperative. (TR 32).[3] Accompanying Turner was Special Agent Karen Dutton, who testified that certain silencers taken from the premises had no manufacturer's identification marks. (TR 82-83). She did not know whether an inventor's silencer which was unsuccessful would be required to be stamped with a serial number. (TR 94). She described Mr. Leasure as accommodating and polite. (TR 95-96).

Firearms Branch Specialist Gary Schaible was shown a copy of *(Your Guide to) Federal Firearms Regulation 1988-1989,* a BATF publication. (TR 129). Schaible denied that the following passage, identified as Section 179.102 (of 27 C.F.R.), was a regulation:

> The manufacturer, importer, or maker shall also identify a firearm frame or receiver or any other part defined as a machinegun, firearm muffler, or firearm silencer in this part which is not a component part of a complete firearm at the time it is sold or disposed of, as required by this section.

(TR 129-30).

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2. *See* 26 U.S.C. § 5801 (manufacturer's special occupational tax under I.R.C. Chapter 53, which is Title II of the Gun Control Act); 18 U.S.C. § 923 (licensing of firearm manufacturers). As a special taxpayer and licensee, LeaSure qualified lawfully to manufacture "firearms," which include silencers.

3. "TR" refers to the transcript of trial proceedings, January 18-19, 1996. Since no material facts are in dispute, it is not included in the Appendix.

Firearms Enforcement Officer Richard A. Turner testified that a silencer reduces noise in the same manner as an automobile muffler. (TR 136-37). He opined that the items in question reduced sound. (TR 144). He also testified that a 2-liter Coke bottle stuck on the end of a rifle is a silencer. (TR 160).

Mr. Leasure testified that, as a special occupational taxpayer licensed to deal in NFA firearms (TR 181, 190), he designed silencers for marketing to military, police, and the special operations community. (TR 184). He had a patent on his silencer design. (TR 187). He had a security clearance with the Defense Logistics Agency. (TR 190). His domestic market was the U.S. Armed Forces, the Secret Service, and such entities, and he also had an export market. (TR 191). He exhibited purchase orders from government entities. (TR 193).

Leasure also testified that "there's no comparison" between the low decibel reduction of the unserialized silencers and that of the finished silencers which his company actually marketed. (TR 222-26). The silencers were locked in steel cabinets, and he fully cooperated with BATF in the search. (TR 228-29).

In manufacturing process, when a silencer is finished, it is stamped with the serial number and the manufacturer's identification. (TR 231). Leasure did not stamp the unfinished, unserialized silencers because they were prototypes which were not for sale. Finished silencers were for sale and were serialized. (TR 231-32). To be finished, a silencer must be sandblasted and blackened or treated with a silver finish. The prototypes were not finished, but were "just thrown together" for experimentation and replacement of parts. (TR 266-27).

Leasure testified that "the prototype items, were manufactured, researched and developed for governmental clients." (TR 288). He interpreted the regulation to require

serialization prior to any sale. (TR 300-01). Before silencers could be marketed, "they would have had to have been sandblasted, anodized, welded or Loctited and stamped with a serial number and Form 2." (TR 305).[4]

REASONS FOR GRANTING THE WRIT

The sole question presented on this Petition is: Whether the legal ambiguity created by the conflict between the governing statute, 26 U.S.C. § 5861(i), and the applicable regulation, 27 C.F.R. § 179.102, constitutes a denial of substantive due process, and therefore precludes a conviction.

This question was specifically presented as the third part of Petitioner's appeal to the Fourth Circuit, and it was erroneously interpreted by that Court, which concluded that the applicable regulation, 27 C.F.R. § 179.102, only "describe[s] *how* the serial number is to be applied . . . and *what* information the serial number must contain." (Slip Opinion, pp. 4-5.)

In fact, this Regulation in its third paragraph also provides as follows:

> A firearm frame or receiver or any other part defined as a machinegun or a muffler or *silencer* for the purposes of this part which is not a component part of a complete weapon *at the time it is sold, shipped, or otherwise disposed of by a manufacturer, importer, or maker shall be identified as required by this section.*

(Emphasis added.)

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4. "Form 2" is the industry term for the form used to register a newly manufactured weapon.

Thus it is clear that this regulation speaks not only to the *how* and *what* of marking of the silencer, but also to the all-important *when*, which is the crux of this case.

Defendant was convicted for violation of 26 U.S.C. § 5861(i), in accordance with Count One of his indictment, which states as follows, in its pertinent part:

> It shall be unlawful for any person —
>
> (i) to receive or possess a firearm which is not identified by a serial number as required by this chapter. . . .

Violation of this section carries the severe maximum penalties of ten (10) years in prison and a $250,000 fine.

Petitioner Leasure, as a manufacturer, "possessed" the firearm (silencer) as soon as he created it, and, according to the statute, could continue his possession lawfully only if it was immediately marked with his manufacturer's logo and a serial number which, according to the custom of the industry, would be a number he simply made up, provided it was different from any other previously used by him. *See* 27 C.F.R. § 179.102.

However, according to the regulation, which he had in his shop and which was the only legal source available to him, he was not required to mark one of the incomplete, experimental silencers, not being part of a "complete weapon", until it was "sold, shipped, or otherwise disposed of."

Since the silencers had not met his exacting standards of performance, they were never going to be either finished or sold. (TR 222-26).

Substantive due process requires laws that are understandable and free of inherent contradiction, as here. Such laws are *per se* arbitrary.

The touchstone of due process is protection of the individual against arbitrary action of government. *Wolff v. McDonald,* 418 U.S. 539, 41 L. Ed. 2d 935 (1974).

In 16A *Am. Jur. 2d* "Constitutional Law" § 818 at pp. 989-991 it is said:

> The due process requirement of definiteness is especially important in its application to penal and criminal statutes. The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain, understandable rule of conduct and know what acts it is his duty to avoid. The constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense of whose nature he was given no fair warning.

The lack of "fair warning" in this case is, of course, the contradictory nature of the requirement of 26 U.S.C. § 5861(i) which makes it a Class C felony to "possess" a silencer "not identified by a serial number"; and 27 C.F.R. § 179.102 which says that it must be so marked at the time it is "sold, shipped, or otherwise disposed of."

Thus, the present case falls squarely within the legislative conduct prohibited by this Court in its opinion in *United States*

v. Harriss, 347 U.S. 612, 98 L. Ed. 989 (1954): that it is settled that, as a matter of due process, a criminal statute is unconstitutional that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."

Such is the case here where the Petitioner, a federally licensed firearms manufacturer, is given by his regulatory agency, the Bureau of Alcohol, Tobacco and Firearms (BATF) the manual of federal regulations entitled, *(Your Guide to) Federal Firearms Regulation 1988-1989*, and is told by the BATF agent (in effect): this is your Bible; follow it and you will stay out of trouble. (TR 129-130). This was the current edition of the handbook at the time of the BATF raid in February, 1994.

The most troubling aspect of this case is that, at all pertinent times, it is absolutely clear that the Petitioner was of an entirely innocent state of mind. He was a man with no history of criminal conduct, a former special deputy sheriff in his home county, a lifelong law-abiding citizen, who at the time of this offense was following his regulations and believing that he was in full compliance with the law's requirements. He had no way of knowing that the governing statute said the exact opposite from the regulation, in the crucial element of *when*.

The regulations are developed and propounded pursuant to 26 U.S.C. § 7805(a) which states: "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the *enforcement* of this title." (Emphasis added.)

There is uniform agreement among all courts that the regulations promulgated by the Treasury Department on the firearms laws are entitled to deference. Such a case in the Fourth Circuit is *Nat. Rifle Assn. v. Brady*, 914 F.2d 475 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

It was also held in *United States v. Moore,* 84 F.3d 1567 (9th Cir. 1996), that BATF interpretations which are favorable to the taxpayer are binding. The Court said: "longstanding principles of lenity . . . demand resolution of ambiguities in criminal statutes in favor of the defendant." *Id.* at 1572.

It would violate due process to convict a person for acting consistent with the agency's regulations. *United States v. Pennsylvania Indus. Chem. Corp.,* 411 U.S. 655, 670-75 (1973) held:

> [Defendant] had a right to look to the [administrative agency] regulations for guidance. . . . "The rulings, interpretations, and opinions of the [responsible agency]. . . ., do constitute a body of experience and informed judgment to which . . . . litigants may property resort for guidance." . . . . Thus, to the extent that the regulations deprived [defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution.

Mr. Leasure's acts here were consistent with the BATF regulations. Regulations informing the public that certain conduct is legal suggest that the conduct is indeed legal and, at the very least, suggest that a statute is sufficiently ambiguous that it must be interpreted in favor of the defendant and against the government.

United States v. Anzalone, 766 F.2d 676, 680-82 (1st Cir.

1985) described a situation where a government agency ruled that certain conduct is lawful:

> The present ambiguity regarding coverage of the Reporting Act and its regulations has been created by the government itself. . . . But for reasons known only to the Treasury Department, the regulation enacted by the Secretary, 31 C.F.R. 103.22, limited the reporting requirement to the financial institution only . . . . should such a regulation have alerted or put on notice "other participants in the transaction" that something was required of them vis-a-vis the filing of the report? We think not. Such a regulation, in the face of the self-imposed limitation made upon the original power granted to the Secretary by [31 U.S.C.] Section 5313(a), would at the least cause confusion in the minds of "other participants in the transaction," and even more likely lead them to conclude that they had been excluded from its affirmative duties.

Anzalone offered the following comments which also applies to instances in which BATF has adopted regulations opining that conduct is lawful, and thereafter instigates a prosecution claiming the conduct to be unlawful:

> We cannot engage in unprincipled interpretation of the law, lest we foment lawlessness instead of compliance. . . . This is particularly so when the confusion and uncertainty in this law has been caused by the government itself, and when the solution

> to that situation, namely eliminating any perceived loop holes, lies completely within the government's control. If the government wishes to impose a duty . . . . , let it require so in plain language. . . .
>
> . . . . The application of criminal sanctions to appellant for engaging in the activities heretofore described violates the fair warning requirements of the due process clause of the fifth amendment. *Id.* at 682.

The regulations here told Mr. Leasure that he had an obligation only to stamp a serial number on the "frame or receiver" of a "firearm" as defined in Chapter 53, and then defined "frame or receiver" in a manner as to include weapons that shoot and to exclude silencers. The regulations here also told Mr. Leasure that the deadline for placing the serial number on silencers that are incomplete is the time the silencers are "sold, shipped, or otherwise disposed of." Convicting him for acting consistently with these regulations violates due process.

As this Court said in *Lambert v. California,* 355 U.S. 225, 2 L. Ed. 2d 228 (1957):

> Where a person did not know of a duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community. *Id.* at 229-230; 2 L. Ed. 2d at 232.

CONCLUSION

The initial misreading by the Fourth Circuit of the regulation, 27 C.F.R. § 179.102, is understandable. However, its failure to grant a rehearing on this point when specifically called to its attention by Appellant's motion is inexplicable and troubling.

It places the Fourth Circuit at odds with all of the other Circuit Courts of Appeal on the important due process issue raised in this Petition, if its failure to act can de deemed a form of action.

For this reason, this Petition brings to the Supreme Court an important constitutional issue which needs to be decided.

We ask that a writ of certiorari be issued.

Respectfully submitted,

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APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MARCH 27, 1997

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96-4481

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN DANIEL LEASURE,

Defendant-Appellant.

No. 96-4516

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JOHN DANIEL LEASURE,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Virginia, at Newport News.
John A. MacKenzie, Senior District Judge.
(CR-95-54)

Submitted: March 11, 1997

Decided: March 27, 1997

Appendix A

Before HAMILTON, WILLIAMS, and MOTZ, Circuit Judges.

No. 96-4481 affirmed and No. 96-4516 vacated and remanded for resentencing by unpublished per curiam opinion.

COUNSEL

Stephen P. Halbrook, Fairfax, Virginia, for Appellant. Helen F. Fahey, United States Attorney, Vincent L. Gambale, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

John Leasure was found guilty following a bench trial of one count of possessing firearms not identified by a serial number. *See* 26 U.S.C.A. § 5861(i) (West 1989). On appeal, Leasure asserts that his conviction should be reversed because (1) the indictment failed to state all of the elements of the offense and (2) the evidence was insufficient to support his conviction. The Government cross-appeals, asserting that the district court abused its discretion by departing downward from the Sentencing Guidelines. We affirm Leasure's convictions, but remand for resentencing.

Leasure was a federally licensed dealer and manufacturer of firearms specializing in the manufacture and sale of silencers. His primary clients were the United States Government and foreign governments, whom he sold silencers to with the

authorization of the United States. Nothing in the record suggests that Leasure's firearms business served as a front for illegal activities. During a routine compliance inspection, several discrepancies were discovered in Leasure's inventory and record keeping procedures. Investigators, accompanied by field agents of the Bureau of Alcohol, Tobacco, and Firearms (BATF), returned to Leasure's business approximately three days later and executed a search warrant, seizing numerous firearms, including silencers.

Leasure was indicted for "knowingly and unlawfully possess[ing] nineteen (19) firearm silencers . . . which were not identified by serial number . . . [i]n violation of [26 U.S.C.A. § 5861(i)]." (J.A. at 8-9.) Under the statute, it is unlawful for any person to "possess a firearm which is not identified by a serial number as required by this chapter." 26 U.S.C.A. § 5861(i). Relying on our decision in *United States v. Daniels*, 973 F.2d 272 (4th Cir. 1992), *cert. denied*, 506 U.S. 1086 (1993), Leasure asserts that the failure to include in the indictment the phrase "as required by this chapter," or to identify the provisions implicated by the phrase, rendered the indictment invalid because the phrase (and the implicated provisions) constitute essential elements of the offense. Specifically, Leasure asserts that the indictment should have referred to 26 U.S.C.A. § 5842 (West 1989), which specifies the requirements for serial number identification under the statute.*

---

* Specifically, § 5842 provides:

> (a) *Identification of firearms other than destructive devices.* — Each manufacturer and importer and anyone making a firearm shall identify each firearm, other than a destructive device, manufactured, imported, or made by a serial number which may not

(Cont'd)

Objections based on defects in the indictment must be raised prior to trial. *See* Fed. R. Crim. P. 12(b)(2). Since Leasure failed to object to the language in the indictment prior to trial, we review his conviction for plain error under Federal Rule of Criminal Procedure 52(b). *See United States v. Olano*, 507 U.S. 725, 731-32 (1993); *United States v. Cedelle*, 89 F.3d 181, 184 (4th Cir. 1996); *United States v. David*, 83 F.3d 638, 640, 641 (4th Cir. 1996). Rule 52(b) contains three elements that must be satisfied before an appellate court may notice an error not preserved by a timely objection. First, the asserted defect in the trial proceedings must, in fact, be error; second, the error must be plain; and third, it must affect the substantial rights of the defendant. *See Olano*, 507 U.S. at 732; *Cedelle*, 89 F.3d at 184; *David*, 83 F.3d at 641. However,

> [e]ven then, "Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the Court of Appeals, and the court should not exercise that discretion

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(Cont'd)

> be readily removed, obliterated, or altered, the name of the manufacturer, importer, or maker, and such other identification as the Secretary may by regulations prescribe.
>
> (b) *Firearms without serial number.* — Any person who possesses a firearm, other than a destructive device, which does not bear the serial number and other information required by subsection (a) of this section shall identify the firearm with a serial number assigned by the Secretary and any other information the Secretary may by regulations prescribe.

26 U.S.C.A. § 5842 (West 1989).

> unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' "

David, 83 F.3d at 641 (second alteration in original) (quoting *Olano*, 507 U.S. at 732 (citations omitted)).

Here, the district court did not commit plain error, and Leasure's reliance on *Daniels* is misplaced. In *Daniels*, the defendant was charged with violating 26 U.S.C.A. § 5861(e) (West 1989). We held that "[t]he essential elements of a violation of § 5861(e) are: 1) the knowing transfer; 2) of a firearm; 3) 'in violation of the provisions of this chapter,' *i.e.*, Title 26, Chapter 53." *Daniels*, 973 F.2d at 272 (citing *United States v. Garrett*, 583 F.2d 1381, 1387-89 (5th Cir. 1978)). We further held that since it was necessary to violate another provision of Title 26 in order to violate § 5861(e), the third element was essential, and the indictment should have contained this element and identified the provisions it implicated. *See id.* Since the indictment failed to do so, it was fatally defective as to the § 5861(e) offense.

Unlike the situation in *Daniels*, it is not necessary to violate another provision of Title 26 in order to violate § 5861(i). The essential elements of § 5861(i) are: (1) possession; (2) of a firearm; (3) lacking a serial number. *See, e.g.*, *United States v. Stout*, 667 F.2d 1347, 1353 (11th Cir. 1982) (holding that "the government . . . undeniably bore its burden as to the essential elements of 26 U.S.C. § 5861(i)" where the evidence showed that "the silencers, made by defendants and in defendants' possession at the time of their arrest, were not stamped with any identifying markings"). The other requirements referred to in the statute, *i.e.*, the "as required by this chapter" items outlined in 26 U.S.C.A. § 5842, are administrative in nature and describe

how the serial number is to be applied (*i.e.*, so that it "may not be readily removed, obliterated, or altered") and *what* information the serial number must contain (*i.e.*, "the name of the manufacturer, importer, or maker, and such other identification as the Secretary may by regulations prescribe"). Leasure was not charged with possessing silencers with serial numbers that had been improperly applied, or with possessing silencers with serial numbers containing false information; instead, he was charged with, and convicted of, possessing silencers *without* serial numbers. Since the indictment contained the essential elements of possessing a silencer without a serial number, it was not defective.

Leasure also claims that the evidence was insufficient to support his conviction. He argues that no evidence was presented concerning serial number identification requirements outlined in 26 U.S.C.A. § 5842, and in 27 C.F.R. § 179.102 (1996). Both the statute and the regulation, however, are administrative in nature. Both inform a manufacturer, importer, or maker of firearms how and where to place firearm serial numbers and what information such numbers must contain. Because Leasure was not charged with possessing silencers with improper serial numbers, these provisions are not relevant. And, after reviewing the record and the parties' briefs, we conclude that there was substantial evidence supporting Leasure's conviction for possessing silencers not identified by a serial number. *See Glasser v. United States*, 315 U.S. 60, 80 (1942).

The presentence report stated that Leasure's guideline range was forty-one to fifty-one months imprisonment and that no basis for departure was present. Leasure did not object to this latter recommendation. Nevertheless, the district court departed downward nine levels, placing Leasure's guidelines range at

twelve to eighteen months imprisonment. The district court's explanation at sentencing for departing downward consisted entirely of the following:

> Normally, going strictly by the guidelines in the case we would come up with the possession of silencers and it being a violation of the statute would come into the guidelines with a [base offense level of] 18 points under [U.S. Sentencing Guidelines Manual §] 2K2.1(a)(5) [(1995)]. . . .
>
> And if I took into account the whole 19 of the silencers, there would be added . . . 4 points and that would come up with a total of 22 for which the guideline sentencing table would reach 41 to 51 months. But I'm satisfied in the case not that there hasn't been a violation, there has been so far as I'm concerned clearly shown, but that the impact of the bundle of silencers which were introduced as evidence in this court range from little small implements to something of considerable size and the finding of those in a cabinet, as Mr. Leasure suggests, in a locked cabinet, and, of course, at that point the violation had already occurred.
>
> But it seems to me that this matter falls under [§ 5K2.0] of the guidelines and I quote it. It says that the judge may depart from the guidelines and impose a sentence outside of the guidelines, "if there exists an aggravating

> or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the sentencing commission in formulating the guidelines, that should result in a sentence different from that described." I think that's the case here.
>
> I'd add one thing further in Mr. Leasure's favor[:] . . . the sales that had been made by him had been made to other Governments under prohibitions granted by the United States or to the agencies of the United States so that generally speaking there was a great deal of scrutiny being applied to silencers and their manufacture as indeed there should be because it's certainly an implement that is used in covertness of the most advanced sort. I, therefore, will depart down . . . by 9 points.

(J.A. at 125-26.) The district court sentenced Leasure at the bottom of the adjusted guidelines range, to twelve months imprisonment.

Following the imposition of Leasure's sentence by the district court, the Supreme Court issued its decision in *Koon v. United States*, 116 S. Ct. 2035 (1996), illuminating the analysis a reviewing court must employ in assessing whether a sentencing court erred in departing from the applicable guideline range. In *Koon*,

> [t]he Court explained that when assessing whether a potential basis for departure was adequately considered by the Commission in

> formulating the guidelines, the correct inquiry necessarily focuses on whether the factor is addressed by the guidelines, policy statements, or official commentary and whether it is encompassed within the heartland of situations to which the guidelines were intended to apply.

United States v. Brock, No. 96-4405, slip. op. at 3-4 (4th Cir. Feb. 28, 1997) (citing *Koon*, 116 S. Ct. at 2044-45); *see also United States v. Rybicki*, 96 F.3d 754, 757 (4th Cir. 1996). The Supreme Court also declared in *Koon* that we are to review a district court's decision to depart from the Sentencing Guidelines for abuse of discretion. *See Koon*, 116 S. Ct. at 2046.

On the record before us, we are unable to ascertain whether the district court abused its discretion in departing downward from the Sentencing Guidelines. In *Koon*, the Supreme Court instructed that

> [b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, [*i.e.*, whether the case falls outside the heartland,] the district court must make a *refined assessment* of the many facts bearing on the outcome.

Koon, 116 S. Ct. at 2046 (emphasis added). The district court determined to depart from the guidelines at Leasure's sentencing hearing on May 21, 1996, several days before the Supreme Court decided *Koon* on June 13, 1996. As a result, the district court

was unaware of the dictates of *Koon*, and failed to make the "refined assessment of the many facts" required by that decision. Indeed, we are unsure of the facts, if any, the district court relied upon in determining that this case warranted a departure. Accordingly, we affirm Leasure's conviction, vacate his sentence, and remand to the district court for resentencing in light of *Koon*.

No. 96-4481 — *AFFIRMED*
No. 96-4516 — *VACATED AND REMANDED FOR RESENTENCING*

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NEWPORT NEWS DIVISION DATED MAY 31, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

4:95-CR-00054-001

UNITED STATES OF AMERICA

v.

JOHN DANIEL LEASURE

ORDER

It appears to the Court that page 1 of the Judgment Order entered May 21, 1996, and filed May 29, 1996, regarding the above named defendant, erroneously states: "Counts 2, 3, 4, 5 & 6 are dismissed." This statement should be corrected to read: "Counts 2, 3 & 6 are dismissed on Defense Motion." "The defendant has been found not guilty on Counts 4 & 5" should be added.

IT IS HEREBY ORDERED that the above language be made a part of said Judgment Order and that in all other respects, the Judgment Order remains as it was originally entered.

s/ John A. Mackenzie
JOHN A. MACKENZIE
UNITED STATES DISTRICT JUDGE

Newport News, Virginia
Dated May 31, 1996

APPENDIX C — JUDGMENT IN A CRIMINAL CASE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA FILED MAY 29, 1996

UNITED STATES DISTRICT COURT
Eastern District of Virginia

Case Number: 4:95CR00054-001

UNITED STATES OF AMERICA

v.

JOHN DANIEL LEASURE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

David N. Montague, Esquire
Defendant's Attorney

THE DEFENDANT:

* * *

[X] was found guilty on count(s) 1 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
26 USC 5861(i)	POSSESSION OF FIREARMS NOT IDENTIFIED BY SERIAL NUMBER	2/8/94	1

Appendix C

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

[X] Count(s) 2, 3, 4, 5, & 6 are dismissed.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
231-88-2957

Defendant's Date of Birth:
8/5/58

Defendant's USM No.:

Defendant's Mailing Address:
717 Windbrook Circle
Newport News, VA 23602

Defendant's Residence Address:
717 Windbrook Circle
Newport News, VA 23602

May 21, 1996
Date of Imposition of Judgment

s/ John A. MacKenzie
Signature of Judicial Officer

JOHN A. MACKENZIE
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

May 21, 1996
Date

Appendix C

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWELVE (12) MONTHS.

The court waives the cost of imprisonment for the defendant.

* * *

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons/U. S. Marshal.

[X] before 2:00 p.m. on June 20, 1996, as notified by the U. S. Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

The court waives the cost of supervised release for the defendant.

The defendant shall report to the probation officer in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

Appendix C

While on supervised release, the defendant shall not illegally possess a controlled substance.

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the following additional conditions:

The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter, if directed by the probation officer to do so.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NEWPORT NEWS DIVISION FILED FEBRUARY 6, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CRIMINAL NO. 4:95cr54

UNITED STATES OF AMERICA

v.

JOHN DANIEL LEASURE

ORDER

This matter came before the court for a bench trial on January 18, 1996. The court, having taken evidence and heard argument of counsel, makes the following findings:

Count One

The court finds the defendant, John Daniel Leasure, GUILTY as charged in Count One.

1. Beyond any doubt the nineteen (19) silencers listed in Count One of the Indictment are "firearms", as defined in 26 U.S.C. § 5845(a)(7), and "firearm silencers" as defined in 18 U.S.C. § 921(a)(24). The silencers are complete in their assembly and, except for minor cosmetic finishing, are fully operable.

2. All nineteen (19) silencers were manufactured by the

defendant. He so acknowledged this in admissions made pretrial to ATF agents. He repeated being the source of their construction in his trial testimony.

3. All nineteen (19) silencers had been appropriately test fired by the defendant and in each case the noise reduction had been measured in decibels and had been recorded by him in his own records.

4. The law requires that these silencers be properly marked with serial numbers and timely registered under the National Firearms Registration Act, 26 U.S.C. § 586(d) & (i). However, these nineteen (19) silencers were not marked with any serial numbers and had not been registered according to law.

Count Two

The court finds the defendant, John Daniel Leasure, GUILTY as charged in Count Two.

1. There are eight (8) silencers listed originally in Count Two of the Indictment but one was deleted before trial. All have been proved to have been in the defendant's possession on February 8, 1994. We find that six (6) of the silencers in his possession, were not registered to the defendant as required by the provisions of the National Firearms Act, 26 U.S.C. § 5861(d), as defined in 26 U.S.C. § 5845(a)(7) and 18 U.S.C. § 921(a)(24). See Government exhibit 7-1. We conclude that one silencer, bearing serial number 90800P, is shown to have been registered to the defendant under the serial number 90800, although the letter "P" appears to have been omitted from the registry. We find this silencer to have been properly registered and properly in defendant's possession.

Appendix D

2. The court finds that the defendant illegally possessed six (6) of the silencers which were not properly registered to him.

Count Three

The court finds the defendant, John Daniel Leasure, GUILTY as charged in Count Three.

1. The four (4) silencers with proper serial numbers listed in Count Three of the Indictment were found in the defendant's possession on February 8, 1994. However, Government's exhibit 7-3 has certified that none of the four (4) silencers in Count Three were found to be registered to the defendant, or to Precision Arms International on February 8, 1994.

Count Four

The court finds the defendant, John Daniel Leasure, NOT GUILTY, as charged in Count Four.

1. The four (4) weapons described in Count Four are "integrated" weapons, i.e. each of the four is described as a rifle or a handgun with an appropriate serial number to which has been attached a silencer, also with a described serial number.

2. The trial record was not transcribed but the court's notes indicate Government testimony that if the rifle serial number or the silencer serial number, either one or the other, by records in the National Firearms Registry reveal proper possession of such a weapon in the hands of the defendant, that this is enough to support proper possession of the integrated weapon.

Appendix D

3. The Government's exhibits of weapon registry under the National Firearms Act, Exs. 7-1, 7-2, 7-3, 7-4, and 7-5, do not disclose any attempt to locate the registry of the four (4) rifles or handguns described in Count Four.

4. We conclude, therefore, that it has not been proved that the rifles or handguns integrated with silencers in Count Four were not properly in defendant's possession.

Count Five

The court finds defendant, John Daniel Leasure, NOT GUILTY as charged in Count Five.

1. The "weapons" described as machine guns in Count Five, were very small parts packages, roughly two inches by four inches. The Uzi firing pin, a single item, was about an inch or so long of very small diameter.

2. An ATF official in his testimony at this trial was asked if the latitude of the manufacturing license held by the defendant, would allow the defendant the right to have such parts in his inventory. The ATF official specifically replied that in his opinion such small parts could properly be an inventory item.

3. The Untied States has failed to prove the defendant guilty as charged in Count Five.

Count Six

The court finds the defendant, John Daniel Leasure, GUILTY as charged in Count Six.

Appendix D

1. A "pen" gun, a single shot, 22 caliber weapon was found in defendant's possession on February 8, 1994. It was described in the Indictment as a Military Armament Corp. SSSW-22 LR-150500-A pen gun.

2. According to Government's exhibit 7-4, it is certified that no such weapon was properly registered to defendant under the National Firearms Act, on February 8, 1994.

To a large extent, the defense in this case centered around various transfers of firearms and silencers made by the defendant to his accountant, Carl O'Quinn, who was also a licensed gun dealer, during the course of some collateral breach of contract and bankruptcy proceedings not related to this case. Defendant apparently hurriedly transferred several of the firearms and firearm silencers listed in some counts of the Indictment by filing the required transfer forms with the ATF. Subsequent to ATF approval of the transfers, which indicated the transferee as Carl O'Quinn, defendant attempted to void these transfers by writing in large letters the word "VOID" across the approved transfer forms. It is not clear when the defendant took this action to write the word "void", but the court need not speculate. The defendant claims he faxed the "VOID" embossed transfers to ATF. ATF officials deny receipt thereof. This activity is of little significance here since this was an inappropriate method of cancelling the valid transfers that defendant had made, would not serve to invalidate the transfers, and not excuse his violation of the law. In his trial testimony, defendant conceded that no physical transfer to O'Quinn was ever accomplished.

The defendant further argued that he lacked knowledge as to his violation of the registration requirements of the National Firearms Act. Under the National Firearms Act, it is sufficient

to sustain a conviction if the Government proves three material elements: (1) that defendant possessed certain items; (2) that the items possessed were "firearms" or "firearms silencers"; and (3) that the firearms or silencers were not properly registered to the defendant. The Government has proven knowing possession of items in this case, as well as knowledge that items possessed were "firearms" or "firearms silencers". No specific intent or knowledge need be proved in regard to the unregistered status of the items. *United States v. Freed*, 401 U.S. 601, 612 (1971).

The Clerk is directed to reconvene the case of *United States of America v. John Daniel Leasure*, file number 4:95cr54, at 10:00 a.m. on February 16, 1996, at the United States Courthouse, Newport News, Virginia. The defendant is directed to be present with his attorney at that time and place.

The Clerk is directed to send a copy of this Order to Arenda Wright Allen, Esquire, Assistant United States Attorney, World Trade Center, Suite 8000, 101 West Main Street, Norfolk, Virginia 23510, and to counsel for defendant, David N. Montague, Esquire, One East Queen's Way, 2nd Floor, Hampton, Virginia 23669. A copy of this Order has also been faxed to the Assistant United States Attorney and counsel for defendant.

It is so **ORDERED.**

s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
February 1, 1996

APPENDIX E — INDICTMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NEWPORT NEWS DIVISION FILED NOVEMBER 14, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CRIMINAL NO. 4:95cr00054

UNITED STATES OF AMERICA

v.

JOHN DANIEL LEASURE

26 U.S.C. § 5861(i)
Possession of Firearms Not
Identified by Serial Number
(Count One)

26 U.S.C. § 5861(d)
Possession of Firearms Not
Registered in the National
Firearms Registry
(Counts Two – Four and Six)

18 U.S.C. § 922(o)(1)
Possession of Machineguns
(Count Five)

INDICTMENT

November, 1995 *TERM* — at Norfolk, Virginia

Appendix E

COUNT ONE

THE GRAND JURY CHARGES THAT:

On or about February 8, 1994, in Saluda, Virginia, within the Eastern District of Virginia, JOHN DANIEL LEASURE, the defendant herein, did knowingly and unlawfully possess nineteen (19) firearm silencers, more particularly described as:

Description

Silencer, Black, 9"
Silencer, Silver and green, 6 3/4"
Silencer, Silver, 11"
Silencer, Silver, 8"
Silencer, Unpolished metal, 6 1/4"
Silencer, Silver, 6 3/4"
Silencer, Silver with tape, 6 1/2"
Silencer, Black, 8"
Silencer, Black, 9 3/4"
Silencer, Green, 13 1/2"
Silencer, Silver, 6 3/4"
Silencer, Silver, 6 1/2"
Silencer, Black, 6 3/4"
Silencer, Silver, 5"
Silencer, Unpolished metal, 4 3/4"
Silencer, Black, 5 1/2"
Silencer, Silver, 5 3/4"
Silencer, Black, 11"
Silencer, Black, 5 1/2"

which were not identified by serial number, all of which are "firearms", as defined in Title 26, United States Code, Sections

5845(a)(7) and "firearm silencers", as defined as defined in Title 18, United States Code, Section 921(a)(24).

(In violation of Title 26, United States Code, Section 5861(i).)

APPENDIX F — DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED MAY 12, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-4481
CR-95-54

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOHN DANIEL LEASURE

Defendant - Appellant

No. 96-4516
CR-95-54

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

JOHN DANIEL LEASURE

Defendant - Appellee

Appendix F

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK